Zainuddin bin Muhammad v Atsco Ltd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–840 OF 2000

GOPAL SRI RAM, DENIS ONG AND KC VOHRAH JJCA

6, 23 AND 27 JULY 2001

Criminal Procedure *— Sentencing — Contempt of court — Failure to comply with court order to disclose assets — Sentence of three months imprisonment — Appeal against — Whether sentence was reasonable*

This was an appeal by the appellant against the sentence of three months imprisonment by the High Court. The appellant, aged 68, was formerly a high government official with an unblemished record. He was charged and found guilty of offending a court order and an order was made in March 1999 requiring the appellant to render a full and true account of all his assets within seven days from the service of the order. The appellant failed to comply with the order within the time stipulated. A consent order was later made on 24 August 2000 to allow the appellant a further seven days from the date of this consent order to deliver his affidavit of assets. He was convicted for contempt of court for failing to declare his assets and was initially sentenced to three months imprisonment. His assets were subsequently disclosed and clearly there was contrition on his part. The appellant appealed against the conviction and sentence. Counsel for the respondents submitted that the sentence of three months was reasonable because there was contumelious disregard of the first order. The counsel further complained about the general conduct of the appellant in which he moved his money about despite there being an injunction operating against him.

Held, setting aside the sentence of three months imprisonment and imposed a warning instead:

(1) (per **Gopal Sri Ram JCA**) There was no dispute that the appellant did not obey the order made on 12 March 1999. However, counsel overlooked the second consent order which extended time. Therefore the time within which the appellant was required to declare his assets was no longer of the essence. What was the essence was whether he did in fact deliver an affidavit of his assets. And of that there was no doubt. He did (see p 4E–G).

(2) (per **Gopal Sri Ram JCA**) The charge against the appellant in its substance said that the appellant did not comply with the first order. There were no complaints about other types of misconduct. So it would not be in order for the court to consider these extraneous matters in the present case. They must be dealt

with on the other motion now pending before the High Court (see pp 4H–5A). A

(3) (per **Gopal Sri Ram JCA**) The justice of the case was not met by sending the appellant to prison. What was of importance was that the respondents had received what they wanted — a declaration of assets. No purpose was served by sending the appellant to prison (see p 5B–C). The sentence was therefore set aside and a warning imposed instead (see p 5C). B

(4) (per **KC Vohrah JCA**) The essence was whether the appellant did in fact disclose all his assets. He did, although he was late in filing them. It was not as if he was an obdurate contemnor who continued to defy the order to disclose his assets (see p 5F-G). C The most appropriate punishment was the purely punitive punishment for a once and for all breach. In considering what punishment to impose, the court had to take into account all relevant circumstances, including the nature of the contempt and mitigating circumstances, which included the contemnor's good character, his health and his age (see p 6A–B). The court was of D the view that in all the circumstances, a warning coupled with a punitive order for costs to the respondent with a certificate for two counsel would suffice (see p 6C).

E

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh perayu terhadap hukuman tiga bulan penjara oleh Mahkamah Tinggi. Perayu, berumur 68 tahun, merupakan seorang pegawai tinggi kerajaan dengan rekod yang bersih. Beliau telah dituduh dan didapati bersalah kerana telah melanggar satu perintah mahkamah dan satu perintah telah dibuat F dalam bulan Mac 1999 menghendaki perayu untuk mengemukakan satu penyata yang penuh dan benar tentang semua aset beliau dalam tempoh tujuh hari daripada penyampaian perintah tersebut. Perayu telah gagal untuk mematuhi perintah tersebut mengikut tempoh yang telah ditetapkan. Satu perintah persetujuan kemudiannya telah dibuat G pada 24 Ogos 2000 bagi membenarkan perayu satu lanjutan tempoh tujuh hari daripada tarikh perintah persetujuan ini untuk menyampaikan afidavit tentang aset-aset beliau. Beliau telah disabitkan kerana menghina mahkamah kerana gagal untuk mengisytiharkan aset-aset beliau dan pada mulanya telah dijatuhkan hukuman tiga bulan penjara. Aset-aset beliau kemudiannya telah H diisytiharkan dan adalah jelas terdapat perasaan sesal di pihak beliau. Perayu telah membuat rayuan terhadap sabitan dan hukuman tersebut. Peguam bagi pihak responden-responden menghujahkan bahawa hukuman tiga bulan penjara adalah munasabah kerana terdapat sikap yang tidak mengendahkan terhadap perintah pertama tersebut. Peguam selanjutnya mengadu tentang perbuatan secara am I perayu di mana beliau telah mengalih-alihkan wang beliau meskipun terdapat injunksi yang beroperasi terhadap beliau.

Diputuskan, mengetepikan hukuman tiga bulan penjara dan sebaliknya mengenakan suatu amaran:

(1) (oleh **Gopal Sri Ram HMR**) Tiada pertikaian bahawa perayu tidak mematuhi perintah yang dibuat pada 12 Mac 1999. Namun begitu, peguam telah terlepas perhatian tentang perintah persetujuan kedua yang melanjutkan masa. Oleh itu masa di mana perayu dikehendaki mengisytiharkan aset-aset beliau tidak lagi penting. Apa yang penting adalah sama ada beliau sememangnya menyerahkan afidavit aset-aset beliau. Dan ini tidak diragui. Beliau telah berbuat demikian (lihat ms 4E–G).

(2) (oleh **Gopal Sri Ram HMR**) Pertuduhan terhadap perayu pada amnya menyatakan bahawa perayu tidak mematuhi perintah pertama tersebut. Tiada aduan tentang lain-lain jenis salah laku. Oleh itu ia tidak mungkin betul bagi mahkamah mempertimbangkan perkara-perkara tidak berkaitan tersebut di dalam kes sekarang ini. Ia mestilah dibincangkan dengan usul lain yang sekarang ini belum selesai di hadapan Mahkamah Tinggi (lihat ms 4H–5A).

(3) (oleh **Gopal Sri Ram HMR**) Keadilan kes ini tidak boleh diukur dengan menghantar perayu ke penjara. Apa yang penting adalah responden-responden telah dapat apa yang mereka hendaki — satu deklarasi aset-aset. Tiada tujuan telah disampaikan dengan menghantar perayu ke penjara (lihat ms 5B–C). Hukuman tersebut oleh demikian diketepikan dan satu amaran dikenakan sebaliknya (lihat ms 5C).

(4) (oleh **KC Vohrah HMR**) Inti pati kes ini adalah sama ada perayu sememangnya telah mengisytiharkan semua aset beliau. Beliau telahpun berbuat demikian, walaupun lewat memfailkannya. Ia bukan seperti beliau adalah penghina keras kepala yang berterusan menentang perintah untuk mengisytiharkan aset-aset beliau (lihat ms 5F–G). Hukuman yang paling sesuai adalah semata-mata hukuman punitif untuk pelanggaran yang hanya berlaku sekali sahaja. Di dalam mempertimbangkan apakah hukuman untuk dikenakan, mahkamah perlu mengambilkira semua keadaan yang relevan, termasuklah sifat penghinaan dan keadaan mitigasi, yang termasuk kelakuan baik penghina, kesihatan beliau dan umur beliau (lihat ms 6A–B). Mahkamah berpandangan bahawa dalam semua keadaan, satu amaran berserta dengan satu perintah punitif untuk kos kepada responden dengan satu sijil untuk dua peguam adalah memadai (lihat ms 6c).]

Notes

For cases on sentencing generally, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3565–3640.

Cases referred to

Danchevsky v Danchevsky (1975) Fam 17 (refd)
Goff v Goff (1989) 1 FLR 436 (refd)
Lightfoot v Lightfoot [1989] 1 FLR 414 (refd)
R v Border Television Ltd (refd)
R v Newcastle Chronicle & Journal Ltd (1978) 68 Cr App Rep 375 (refd)

Appeal from: Civil Suit No D5–596–1999 (High Court, Kuala Lumpur)

Cecil Abraham (*K Kirubakaran, G Rajasingam* and *Paul Chua* with him) (*Kiru & Yong*) for the appellant.
K Anantham (*K Gowri* with him) (*Skrine*) for the respondents.

Gopal Sri Ram JCA: This appeal concerns a very short point. It is of no great moment. The appellant is 68 years old. The High Court found him guilty of offending an order of court. It sentenced him to three months imprisonment. The appellant appealed to us. We heard his appeal on 16 May 2001. We upheld his conviction, but we set aside his sentence. Instead of a term of imprisonment, we discharged him with a warning.

The order in question was made on 12 March 1999. It required that the appellant, within seven days from the service of the order, render a full and true account of all his assets. There is no dispute that the appellant did not obey the order within the time therein limited. He was 40 days late. That is because he prevaricated. But he eventually he did render a true account of all his assets. In any event the order of 12 March 1999 appears to have been superceded by a consent order made on 24 August 2000 which allowed the appellant a further seven days from the date of this second order to deliver his affidavit of assets.

Now, Mr Anantham of counsel for the respondents submitted that the sentence of three months was reasonable because there was contumelious disregard of the first order of 12 March 1999. That may have been the case, but counsel overlooks the second consent order which extended time. So, in my view, the time within which the appellant was required to declare his assets was no longer of the essence. What was of the essence was whether he did in fact deliver an affidavit of his assets. And of that there is no doubt. He did.

Mr Anantham then complains about the general conduct of the appellant. The way in which he moved his money about despite there being an injunction operating against him. Now there may be a great deal to be said about these matters. But I do not think that we ought to be concerned with it. The gravamen of the charge against the appellant appears in the statutory statement lodged in support of the contempt application. In substance it says that the appellant did not comply with the order of 12 March 1999. There are no complaints about other types of misconduct. So it would not be in order for us to consider these extraneous matters in the present case. They must be dealt with on the other motion now pending

before the High Court. That is where I think the judge went wrong. He seems to have been much moved by Mr Anantham's argument that the appellant had moved monies despite a freeze upon them. But that, as I have earlier said, is not the essence of the charge here.

That brings me to the sentence. I ask myself the question whether the sentence passed by the learned judge accords with the justice of the case. It would do so if the effect of the sentence were to uphold the sanctity of the order in court in question and to demonstrate to other offenders the seriousness of wilful disobedience of an order of court. In my view, in all the circumstances, the justice of the case is not met by sending the appellant to prison. What is of primary importance is that the respondents have got what they wanted. A declaration of assets. No purpose is served by sending this man to prison. In my judgment, the sentence passed is manifestly excessive having regard to all the facts here. Hence, I came to the conclusion, concurred that a warning would suffice. The sentence was therefore set aside and a warning imposed instead. The appellant was, however, ordered to pay all the costs in this court. It was also ordered, with no objection being registered on the appellant's part, that his bail security of RM20,000 be escheated to the respondents towards their costs. We also ordered that they be issued a certificate for two counsel in the respondents' favour.

Denis Ong JCA: I have read the judgments of my learned brothers Gopal Sri Ram and KC Vohrah JJCA. I agree with the reasons therein for our decision made in open court at the close of the hearing on 16 May 2001 to uphold the conviction for contempt of court, to set aside the sentence of three months' imprisonment and to warn the appellant instead. Accordingly, the appeal against conviction was dismissed; the appeal against sentence allowed and the contemnor warned. We also ordered costs of two counsel to the respondent, and that the deposit be paid to the respondent towards the account of taxed costs.

KC Vohrah JCA: I have read the judgment of my learned brother Gopal Sri Ram JCA and I agree with the judgment.

As my learned brother has observed, the essence was whether the appellant did in fact disclose all his assets. He did, although he was late in filing them. It is not as if he was an obdurate contemnor who continued to defy the order to disclose his assets. In regard to sentences for contempt, Lord Donaldson MR observed in *Lightfoot v Lightfoot* [1989] 1 FLR 414 at pp 416–417 that there are two different categories of sentences:

> Sentences for contempt really fall into two different categories. There is the purely punitive sentence where the contemnor is being punished for breach. A common example, of course, is a non-molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category.
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> There is a second category which I might describe as a coercive sentence, where the contemnor has been ordered to do something and is refusing to do it. Of course, a sentence in that case also has a punitive element

since he has to be punished for having failed to do so up to the moment of the court hearing, but, nevertheless, it also has a coercive element.

In our case, the most appropriate punishment is the purely punitive punishment for a once and for all breach. In considering what punishment to impose, the court has to take into account all relevant circumstances, including the nature of the contempt and mitigating circumstances which include the contemnor's good character (see eg *Danchevsky v Danchevsky* (1975) Fam 17 and *Goff v Goff* (1989) 1 FLR 436 (CA)), his health and his age. The appellant was a high government official before his retirement with an unblemished record. There is also the fact that he is an elderly person being 68 years of age and that he had a heart bypass surgery some ten years ago, and that he makes frequent visits to his cardiologist. He was foolish for having been recklessly sluggish, but the assets were all disclosed and clearly there is contrition on his part. The court was of the view that in all the circumstances, a warning coupled with a punitive order for costs to the respondent with a certificate for two counsel would suffice (for the imposition of costs as penalty, see eg *R v Border Television Ltd* and *R v Newcastle Chronicle & Journal Ltd* (1978) 68 Cr App Rep 375 at p 377).

Order accordingly.

Reported by Wong Ee Lynn